Filed 12/3/08 In re M.R. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re M. R., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B197676 (Super. Ct. No. JV40569 E) (San Luis Obispo County)
THE PEOPLE, Plaintiff and Respondent, v. M. R., Defendant and Appellant.	

M. R. appeals from an order of the juvenile court committing him to the California Division of Juvenile Justice (DJJ) for a maximum term of nine years based on offenses found true in a sustained Welfare and Institutions Code section 602 petition.[1] The sustained offenses are possession of a firearm on school grounds and assault with a firearm. (Pen. Code, §§ 626.9, subd. (f)(1), 245, subd. (a)(2).) Appellant contends that the court abused its discretion in committing him to DJJ, and that the commitment violates his federal due process rights, as well as the intent

[1] Further statutory references are to the Welfare and Institutions Code, unless otherwise noted.

and spirit of several recent amendments to the Welfare and Institutions Code. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Original Offenses

Appellant was born on October 30, 1987. Until mid-January, 2003, he attended high school and lived with his mother, her fiancé, and his two brothers.[2] His mother's fiancé stored several weapons, including knives and guns, in their house and garage.

On January 16, 2003, after arguing with his mother, appellant retrieved a semiautomatic 9-millimeter pistol, two magazines, and ammunition, and put them in his school back pack. He took the backpack to school on January 17, so that he could go to the front of his class, tell people that he wanted them to remember him, and shoot himself in the head. During second period, he entered a classroom occupied by 30 other students, the teacher and the assistant teacher. After speaking briefly with the assistant teacher, appellant opened his backpack, loaded the pistol with a magazine, put gloves on, and unlocked the gun's safety feature. He walked to the front of the classroom, pulled out the pistol, positioned a round in the chamber, and said, "I have an announcement." With his finger on the trigger, he looked at the teacher and said, "Sit down. Someone close the blinds." He placed a loaded magazine clip on a podium.

Students were crying, pleading for their lives, and asking appellant to put the gun down. He waved the gun around, and pointed it in the air and at the ground. Other students, the teacher, and the assistant teacher tried to reassure appellant and persuade him to stop what he was doing. His best friend urged him to give him the gun, saying that appellant would not shoot him. Appellant agreed he

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[2] Appellant's father died after driving while intoxicated, shortly before appellant's tenth birthday.

would not shoot him. When another student stood, appellant ordered him to sit down. He complied.

The assistant teacher left the classroom to get help. When appellant saw her leave, he directed someone to close the blinds. He told the teacher to lock the door and followed her as she did so. Two students tackled appellant and kept him pinned against the wall until two staff members entered the room. One of them grabbed the gun and the other grabbed appellant. He did not resist their efforts.

After his arrest, appellant told officers that he wanted to die and that he was going to kill himself in front of his whole class because "[his] life sucks." He planned to shoot himself in the head after telling the class that he wanted them to remember him.

Section 602 Petition, Initial Placement and
Events Surrounding Original Disposition

On January 21, 2003, the prosecution filed a section 602 petition charging appellant in count 1 with possession of a firearm on school grounds, in counts 2 and 3 with false imprisonment by violence, and in counts 4 and 5 with assault with a firearm. (Pen. Code, §§ 626.9, subd. (f)(1); 236 & 245, subd. (a)(2).) The petition alleged personal weapon use and serious felony enhancements as to counts 2 through 5. (Pen. Code, §§12022.5, subd. (a) & 1192.7, subd. (c)(8).) The court ordered appellant detained and authorized a psychiatric/psychological evaluation.

In March 2003, while at juvenile hall, appellant punched a window gate in his room which caused his hand to bleed. He used the blood to draw a swastika on the door. (No petition was filed concerning this incident.)

On May 7, 2003, appellant admitted counts 1 (possession of a firearm on school grounds), and 4 and 5 (assault with a firearm) and the count 4 and 5 enhancement allegations. The court found that counts 1, 4 and 5 of the petition were true, dismissed the remaining counts, sustained the petition, and ordered appellant detained pending placement in an appropriate residential facility.

On May 12, 2003, the court ordered appellant detained for at least 12 months in Rancho Valmora in New Mexico, a residential and educational treatment program for severely emotionally disturbed adolescents. Appellant's school district provided funding for the Rancho Valmora placement. During disposition proceedings on June 19, 2003, the court declared appellant to be a ward of the court and placed him on probation.

Subsequent Petitions, Proceedings, Placement, and Events

On December 8, 2004, before appellant completed high school in New Mexico, the probation department filed a section 778 petition seeking modification of the court's previous orders, to provide for his placement in San Luis Obispo County. On December 27, the court authorized his placement in a community group care facility or the residential Youth Treatment Program (YTP) in San Luis Obispo County. YTP provides opportunities for its residents to attend community college, work on a farm, participate in weekly group, individual and family counseling, and receive specialized "one-on-one" treatment with a trained mental health specialist. On January 7, 2005, after completing high school, appellant was placed at YTP.

A section 777 petition filed on February 15, 2005 alleged that appellant had violated the conditions of his probation by locking himself in his YTP room on February 11, 2005, and burning his arm with matches. It further alleged that his room contained a document with information about the Church of Satan, and a letter regarding his attempts to have an intimate relationship with a female YTP resident. After appellant denied the allegations, the court found that he had violated a court order and granted the probation department the discretion to release him to a suitable foster or group home.

On April 7, 2005, the court granted the prosecution's motion to amend the February 15 section 777 petition to strike the arm-burning allegation and replace it with an allegation that on March 3, 2005, appellant took an ice pick from the YTP

office. He admitted the ice pick allegation. The court sustained the petition, and ordered that appellant remain a ward of the court, and return to YTP.

On April 20, 2005, the prosecution filed a section 777 petition alleging that appellant had violated probation on April 19, 2005, just before 8:00 p.m., by running away from YTP after making strange statements and threatening to harm himself. That petition disclosed that appellant called his mother and that she took him to juvenile hall at 9:35 p.m. on April 19. Appellant admitted the petition's allegations. The court sustained the petition on April 21, 2005, and ordered that appellant remain at juvenile hall, with psychologocial/psychiatric/medical services. On May 16, 2005, the court conducted disposition proceedings and ordered that appellant remain a ward under the custody, care and control of the probation department for placement in a community group care facility.

On June 22, 2005, appellant was placed at YTP. On July 20, 2005, the prosecution filed a section 777 petition alleging that on July 19, 2005, appellant gave YTP staff a pocket knife and a broken piece of mirror and disclosed that he had been hiding them in his room to use to cut himself. The petition further alleged that appellant told staff that he did not want to harm himself, and he thought it would be best to turn the items in. The petition noted that appellant had become very upset earlier on the same day but his behavior seemed to de-escalate following YTP staff intervention. Appellant initially denied the petition's allegations. The court ordered that he remain detained at juvenile hall. On July 27, 2005, following an amendment to the petition, appellant admitted that he had kept a pocket knife and a broken piece of mirror in his room for the purpose of cutting himself. The court sustained the amended petition. Disposition proceedings were continued while appellant was evaluated by a psychiatrist.

On September 8, 2005, the court authorized appellant's admission to UCLA Neuropsychiatric Hospital (UCLA-NPH). Appellant stayed there from September 8 through October 1, 2005, just after his 18th birthday, and returned to juvenile hall. UCLA-NPH reported that appellant "was able to maintain exemplary

behavior on [its] unit in the face of provocation from other patients, and while moderately depressed." It also recommended that appellant continue to receive regular group and individual therapy. It stated that he should not return directly to his home environment, but that doing so was a goal in the near future.[3]

On December 22, 2005, the court conducted disposition proceedings, ordered that appellant remain under the supervision of the probation department and directed the community mental health agency to initiate a counseling program for him. It also ordered appellant to serve 244 days at juvenile hall and authorized the probation department to permit him to reside at the Alpha Academy. Alpha Academy is a highly-structured, Christian-based adult transition program in San Luis Obispo County where residents can work, participate in group activities, and learn independent living and social skills.

In January 2006, appellant began receiving weekly counseling with a therapist. He entered Alpha Academy on February 21, 2006, under the supervision of the probation department.

On April 5, 2006, the prosecution filed a section 777 petition which alleged that appellant took a razor blade from the room of a residential staff leader at Alpha Academy. He returned the razor blade on March 31, 2006, and showed Alpha staff a self-inflicted swastika cut on his arm and a self-inflicted pentagram star cut on his stomach. On April 6, 2006, appellant admitted the section 777 petition allegation. The court sustained the petition and ordered that appellant remain at juvenile hall, with the provision of psychological, psychiatric and medical services. The court continued the disposition proceedings to allow a mental health therapist to evaluate appellant and to allow Alpha Academy to consider whether he could re-enter their program. On June 1, 2006, the probation department reported that Alpha Academy would not accept appellant because it could not meet his

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[3] While in custody, appellant often displayed appropriate behavior and earned coveted assignments and privileges.

mental health and emotional needs. Appellant remained at juvenile hall pending further proceedings.

Sometime before June 1, 2006, appellant wrote a poem about killing a female. He said that he had done so while he was angry because therapists had told him to express his feelings on paper. On June 16, appellant was exploring the chemistry of anthrax on the internet. In a subsequent search of his room, juvenile hall staff found that appellant's journal contained words relating to anthrax and other biological weapons, as well as pictures of cells and chemicals. No petition was filed concerning the June 2006 incidents.

On July 6, 2006, appellant was hitting his head against the door of his juvenile hall room. While a nurse treated his injury, he started eating dried blood from the floor. Appellant calmed down and remained in his room. On July 9, 2006, he tore his shirt and made a noose. Staff found him behind his door with the noose around his neck. He seemed to be unconscious and to regain consciousness within 15 seconds. Staff moved appellant to a holding cell for frequent monitoring. No petition was filed concerning the July 6 or the July 9 incident.

On July 17, 2006, while in a holding cell, appellant removed a metal cover from the fire sprinkler. He cut his wrists and feet with the cover and/or another piece of metal from the sprinkler. Juvenile hall officers found him standing against the wall of his cell, with his arms and legs in a "crucifix" pose, with blood dripping from his hands and feet. Officers directed appellant to display his hands. He did not comply, even after they warned him that they would need to use pepper spray if he failed to comply. Officers shot a burst of spray toward appellant. He used bedding to block it. Officers continued trying to persuade him to comply with their directions. Appellant instead stood on his bed, and pulled out two metal items, including the sprinkler cover, and started cutting his wrist. Officers entered the cell and pushed him against the wall. Appellant swung a metal object toward the officers. Appellant resisted the officers until they placed him in leg restraints and

handcuffs. A probation report indicated that this incident occurred shortly after appellant had learned of a "new recommendation" to the DJJ.

On August 17, 2006, the prosecution charged appellant in an adult case with assault with a deadly weapon on a peace officer, obstructing or resisting an executive officer, and possession of a weapon within a juvenile facility. (Pen. Code, §§ 245, subd. (c) & 69; § 871.5.) In November 2006, appellant pleaded no contest to resisting an executive officer. The adult court placed him on felony probation, with multiple conditions, including the completion of the Transition Age Youth (TAY) program, if accepted. The TAY program does not have a locked facility.

Disposition proceedings began in September 2006 and were held on several dates through February 2007. The judge who had heard appellant's juvenile case was transferred to a different court, but arranged to keep appellant's case and returned to juvenile court to conduct proceedings on several occasions.

Robert O'Neil, a consultant with the DJJ intake and court services unit, testified regarding the programs available in DJJ. Other witnesses, including probation department personnel, testified about appellant's previous placements, and the other placement options considered.

Appellant presented several documents relating to *Farrell v. Hickman* (Super. Ct. Alameda County, 2004, No. RG03079344, formerly entitled *Farrell v. Allen*) (*Farrell*), a taxpayer lawsuit against the direction of the California Youth Authority, now DJJ. A consent decree entered in *Farrell* obligates the director to develop remedial plans to correct identified deficiencies at DJJ.[4] Appellant relied on admissions that DJJ made in *Farrell*, testimony from Daniel Macallair, the

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[4] In addition to the consent decree, the *Farrell* documents admitted below include the stipulation regarding DJJ's safety and welfare remedial plan and mental health remedial plan; DJJ's March 31, 2006 safety and welfare plan; the *Farrell* special master's third report on compliance with the consent decree, covering the period September/November 2006; and DJJ's August 24, 2006 mental health remedial plan.

Executive Director of the Center on Juvenile and Criminal Justice (CJCJ), and medical opinions to argue that a DJJ commitment would be detrimental to him.

On February 26, 2007, the court concluded that appellant was in "need of long-term treatment and placement within the structured and secure setting of the [DJJ]." It stated that it considered the following factors before setting the maximum term of physical confinement at nine years: appellant's lack of criminal history, his diagnosed depression, his family history, and the serious nature of the crimes he committed on January 17, 2003.[5]

DISCUSSION

Appellant argues that there is no substantial evidence of probable benefit from the DJJ placement and that his due process rights were violated when the court committed him to DJJ, given its admission that it does not have the facilities, staff, or programs to provide him adequate care. In making his due process claim, appellant relies on the *Farrell* consent decree, other related documents concerning DJJ, and Macallair's testimony that the general conditions at DJJ remain substandard, with a likely period of many years before necessary improvements are complete. He also argues that alternative placements were not sufficiently considered. We disagree with all of these arguments.

The appellate court "reviews a commitment decision for abuse of discretion, indulging all reasonable inferences to support the juvenile court's decision. [Citations.] Nonetheless, there must be evidence in the record demonstrating both a probable benefit to the minor by a [DJJ] commitment and the inappropriateness or ineffectiveness of less restrictive alternatives. [Citations.] A [DJJ] commitment may be considered, however, without previous resort to less restrictive placements. [Citations.]" (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396.) Findings made in connection with a DJJ commitment order will be

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[5] After the death of his father, appellant, his brothers, and their mother lived with his maternal grandparents. Although his father's death "had a devastating effect" on appellant, his relatives criticized him while they praised his brothers.

affirmed on appeal if supported by substantial evidence. (*In re Ricky H.* (1981) 30 Cal.3d 176, 184.)

We review the DJJ commitment order in light of the purpose of the juvenile delinquency laws, which "is twofold: (1) to serve the 'best interests' of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and 'enable him or her to be a law-abiding and productive member of his or her family and the community,' and (2) to 'provide for the protection and safety of the public . . . .' [Citations.]" (*In re Charles G.* (2004) 115 Cal.App.4th 608, 614-615.) "To accomplish these purposes, the juvenile court has statutory authority to order delinquent wards to receive 'care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives of [the juvenile court law]. . . .' [Citation.]" (*Id.*, at p. 615.) "Under section 202, juvenile proceedings are primarily 'rehabilitative' (*id.*, subd. (b)), and punishment in the form of 'retribution' is disallowed (*id.*, subd .(e)). Within these bounds, the court has broad discretion to choose probation and/or various forms of custodial confinement in order to hold juveniles accountable for their behavior, and to protect the public (*ibid.*)," including commitment to DJJ. (*In re Eddie M.* (2003) 31 Cal.4th 480, 507.)

Here, the record supports the court's finding that appellant will probably benefit from a DJJ commitment. O'Neil testified that appellant would fit the criteria for placement in a specialized counseling program (SCP). He also testified that it was highly likely that appellant would be placed in an SCP where he would receive small and large group counseling, led by a youth counselor. Issues such as anger management, social skills, and substance abuse are addressed in group counseling. SCP wards may also participate in small group counseling with a unit psychologist and individual counseling with a psychiatrist or psychologist. O'Neil indicated that based on appellant's age, he could be placed in a specialized program such as at Heman G. Stark School in Chino or the N. A. Chaderjian School

in Stockton. At the Chaderjian School, the ratio of wards to psychologist (or psychiatrist) in SCP and another treatment program ranged from 18-26:1. In contrast, wards in the DJJ general population (those outside treatment programs such as SCP) have far less access to psychologists.[6]

Macallair also addressed DJJ's programs, including SCP. He testified that there is a waiting list for SCP placement but he did not know its length or size. Although Macallair felt that DJJ would be a detrimental placement for appellant, he acknowledged that there is "an enhanced level of psychiatric or psychological personnel in the . . . specialized counseling programs . . . ." He added that the criticism concerns the extent of the psychiatrists' involvement, "given the current staffing patterns . . . ." He indicated that the concerns of custodial staff took priority over those of the psychological staff at DJJ, and that "[i]t's less so in the . . . specialized counseling programs, . . . but still a factor."

The CJCJ report and Macallair indicated that a DJJ placement would be detrimental rather than beneficial to appellant, in view of the limited resources, the limitations on treatment, and the ongoing violence in DJJ. They proposed that the court order that appellant be placed at a "secure location" initially, such as a "high level acute care facility for a period of time, 30 to 90 days," and noted that appellant had done well at UCLA-NPH. Following that placement, they recommended his placement at a psychiatric hospital setting operated by the Devereux Foundation, in Texas or Colorado. CJCJ had apparently intended for appellant's immediate placement at a Devereux facility but Devereux concluded that appellant did not meet the criteria for its residential program. Devereux based its conclusion on appellant's "very recent self harm behaviors, [and its] lack of programming for youth that have already graduated from High School but are not

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[6] In contrast to O'Neil's testimony, the CJCJ report indicated that the SCP programs "are still insufficient in number and quality" and that "only group counseling is available."

stable enough for employment . . . ." Devereux indicated that it would reconsider appellant after a sustained period of emotional stability.

The court questioned Macallair extensively regarding the proposed UCLA-NPH /Devereux treatment and placement proposal. Devereux's facilities were supervised but not fenced-in. Macallair did not know of the program under which appellant could again be admitted to UCLA-NPH, how many Devereux patients were placed there by court order versus voluntarily, or that there was a hospital near Deveruex's facility with the capacity to detain, observe and treat appellant should his mental state deteriorate. Appellant's age rendered him ineligible for some otherwise appropriate placement options. Macallair stated: "[Appellant's] case is not a typical case. And we were looking to determine what exists . . . or what perhaps we could patch together."

The court acknowledged its concerns regarding safety issues at DJJ and stated that appellant's protection from violence and his rehabilitation are important. It also noted the seriousness of his offense and its impact on many young victims before finding that appellant was in "need of long-term treatment and placement within the structured and secure setting of the [DJJ]."

We conclude the court's finding that appellant will probably benefit from a DJJ commitment is supported by the record. As O'Neil testified, at DJJ appellant will likely be placed in an SCP where he can participate in group counseling concerning issues such as anger management, social skills, and substance abuse and he will likely receive individual counseling. The court properly considered public protection and the personal accountability of appellant as factors in making its DJJ placement decision. It recognized that appellant's offenses were serious and had impacted many victims. The court could reasonably conclude that the circumstances of appellant and his offenses, as well as the testimony of O'Neil and probation department personnel, outweighed Macallair's testimony and other evidence regarding the problems at DJJ, and that appellant and the public would benefit from his placement in a secure facility where he would

have an opportunity for rehabilitation. No abuse of discretion or due process violation from the court's decision committing appellant to DJJ has been demonstrated.

Appellant also claims that the court failed to sufficiently consider alternative placement options. The record belies this claim. The court questioned Macallair extensively regarding Devereux and UCLA-NPH. In addition, the court requested a list of each facility that CJCJ had considered as a possible placement for appellant and delayed proceedings to obtain that information. After CJCJ provided a list of several private and public facilities, the court extensively questioned Macallair about them. Many such facilities could not accept appellant because of his age. Moreover, the court took the initiative to seek the parties' consent to contact two specified experienced juvenile court judges in other counties to determine whether any juvenile court had committed a ward to a state mental hospital.

Finally, we reject appellant's claim that amendments to sections 731 and 733 bar his commitment to DJJ although those amendments went into effect on September 1, 2007, after the court committed him to DJJ. Under the amended provisions, a DJJ commitment is limited to juveniles who commit offenses enumerated under section 707, subdivision (b). (See §§ 731, subd. (a)(4) & 733, subd. (c).) Appellant claims that because his most recent juvenile offense (taking a razor blade) is not a section 707, subdivision (b), offense, his commitment should be reversed. He acknowledges that this claim depends upon the retroactive application of sections 731 and 733 and that the courts in *In re Carl N*. (2008) 160 Cal.App.4th 423, 437-439, and *In re Brandon G*. (2008) 160 Cal.App.4th 1076, 1081, concluded that the Legislature did not intend that those sections be applied retroactively. He argues that *Carle N*. and *Brandon G*. were wrongly decided. We disagree.

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Teresa Estrada-Mullaney, Judge

Superior Court County of San Luis Obispo

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